

December 2, 2013

Daniel Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Re: Designation of Critical Habitat for Gunnison Sage-Grouse (78 Fed. Reg. 57604)

Dear Mr. Ashe,

The Office of Advocacy (“Advocacy”) submits these comments on the U.S. Fish and Wildlife Service’s (“FWS”) proposed rule, *Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for Gunnison Sage-Grouse and Proposed Critical Habitat for Gunnison Sage-Grouse*.¹ Advocacy is concerned that FWS has improperly certified the proposed rule. Advocacy believes FWS should publish an Initial Regulatory Flexibility Analysis (“IRFA”).

Background on Advocacy

Advocacy was established to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (“SBA”), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (“RFA”),² as amended by the Small Business Regulatory Enforcement Fairness Act (“SBREFA”),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small businesses and consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule’s publication in the Federal Register, the agency’s response to these written comments submitted by Advocacy on the

¹ *Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for Gunnison Sage-Grouse and Proposed Critical Habitat for Gunnison Sage-Grouse*. 78 Fed. Reg. 57604 (Sept. 19, 2013).

² The Regulatory Flexibility Act, 5 U.S.C. § 601-612 (1980).

³ Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (to be codified at 5 U.S.C. § 601 et seq.).

⁴ The Small Business Jobs Act, Pub. L. No. 111-240 (2010).

proposed rule, unless the agency certifies that the public interest is not served by doing so.

Critical Habitat Designations Directly Affect Small Entities and Require Proper Consideration Under the Regulatory Flexibility Act

Advocacy disagrees with FWS' assertion that the RFA does not apply because all effects on small entities from the critical habitat designation are indirect.⁵ The RFA requires that agencies perform regulatory flexibility analyses or certify that proposed rules will not have a significant economic impact on a substantial number of small entities.⁶ These analyses are only required to examine the impacts on small entities directly affected by the agencies' proposed regulations.⁷ FWS states a "designation of critical habitat . . . only has a regulatory effect where a Federal action agency [e.g. Bureau of Land Management, etc.] is involved in a particular action that may affect the designated critical habitat . . . [thus,] only the Federal action agency is directly regulated."⁸ For support of this assertion, FWS relies heavily on the decision in *American Trucking Associations v. Environmental Protection Agency*.⁹

In *American Trucking*, the Environmental Protection Agency ("EPA") proposed a primary national ambient air quality standard ("NAAQS") for ozone.¹⁰ Under the proposed rule, the EPA required regulated states to create state implementation plans ("SIPs") for imposing the proposed ozone standards on small entities.¹¹ The court found that EPA properly certified the proposed rule as the agency would not directly impact small entities.¹² In its ruling, the court stressed the States have "broad discretion in determining the manner in which they will achieve compliance."¹³ EPA is prohibited from rejecting the SIP based on "its view of the wisdom of [the] State's choices, or of the technological infeasibility of the plan" and can only reject it if the plan is in violation of law.¹⁴ Thus states have discretion to refrain from imposing burdensome compliance standards on small entities, and the EPA is required to approve SIPs.¹⁵

Contrary to the proposed regulation in *American Trucking*, proposed critical habitat designations do not provide federal action agencies the discretion to decide "the manner in which they will achieve compliance" and avoid potentially burdensome regulation on

⁵ See Letter from Dr. Winslow Sargeant, Chief Counsel, Office of Advocacy, to Daniel Ashe, Director, U.S. Fish and Wildlife Service, and Dr. Jane Lubchenco, National Oceanic and Atmospheric Administration, Administrator 3-4 (Jan. 31, 2013) (on file with author) [*hereinafter* "January Letter"].

⁶ January Letter, *supra* at 3; 5 U.S.C. § 601, et seq.

⁷ January Letter, *supra* at 3.

⁸ INDUSTRIAL ECONOMICS, INC., Economic Analysis of Critical Habitat Designation for Gunnison Sage-Grouse at Appendix A, ¶5-7 (Aug. 27, 2013) [*hereinafter* "Economic Analysis"].

⁹ Am. Trucking Ass'ns. v. EPA, 175 F.3d 1027 (D.C Cir. 1999).

¹⁰ Id. at 1133.

¹¹ Id. at 1043-44.

¹² Id. at 1045.

¹³ Id. at 1044.

¹⁴ Id.

¹⁵ Id. In the event that a state does not submit a proper SIP, EPA conceded that a regulatory flexibility analysis of small entity impacts would be necessary for the agency's SIP. Id. at 1044.

small entities. To the contrary, federal action agencies are required to “consult with [FWS] whenever activities that they undertake authorize, permit, or fund may affect a . . . designated critical habitat.”¹⁶ In addition, federal action agencies must follow detailed procedures outlined by FWS.¹⁷ These consultations involve FWS, the federal action agency, and the applying entity, and vary in duration and complexity.¹⁸

Unlike EPA, which is required to approve of state SIPs, the FWS is not required to approve federal action agencies’ permit requests on behalf of applicants, including small entities. Unlike the states in *American Trucking*, any federal agency that stands between FWS and the applicant has very little discretion.¹⁹ FWS is essentially arguing that it, a federal agency, is not regulating small entities because another federal agency, which is required to conduct a consultation with FWS and obtain FWS’s consent to action, stands as an intermediary in the process.²⁰ However, FWS retains the final decision as to what modifications are reasonable and prudent and therefore adequate in order to refrain from running afoul of the ESA.²¹ Since these decisions directly impact small entities, the RFA requires FWS to perform regulatory flexibility analyses to determine whether their proposed critical habitat designations will have a significant economic impact on a substantial number of small entities.²²

Advocacy recommends FWS adopt a regulatory approach similar to other Federal agencies in complying with the RFA. For example, the National Oceanic and Atmospheric Administration (“NOAA”) considers impacts to small entities when proposing critical habitat designations through extensive analysis of economic impacts, including those by federal action agencies, to small entities organized by industry, government, and geographic sector.²³ We believe such an approach will ensure FWS’ compliance with the RFA.

The Economic Analysis Specifically Omits Costs to Private Landowners, Recreation-based Small Entities, and Small Municipalities

According to FWS’ publication, the agency seeks comment on “any foreseeable economic, national security, or other relevant impacts,” particularly on any impacts to small entities.²⁴ While FWS’ economic analysis examines the potential administrative impacts to livestock grazers, recreational uses, and transportation infrastructure, the

¹⁶ Economic Analysis, *supra* at ¶58.

¹⁷ See U.S. FISH AND WILDLIFE SERVICE, Endangered Species Consultation Handbook (1998) available at http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf [hereinafter “Handbook”].

¹⁸ Economic Analysis, *supra* at ¶59-60.

¹⁹ January Letter, *supra* at 4.

²⁰ *Id.*

²¹ *Id.* See Endangered Species Consultation Handbook, at 4-44 (“[FWS] retains[s] the final decision on which reasonable and prudent alternatives are included in the biological opinion. When necessary, [FWS] may question the agency’s view of the scope of its authorities to implement reasonable and prudent alternatives.”).

²² January Letter, *supra*.

²³ *Id.*

²⁴ 78 Fed. Reg. at 57605.

economic analysis omits the proposed rule's costs to private entities, recreation-based businesses, and small municipalities.

Advocacy encourages FWS to separately examine the potential effects of the critical habitat designation on private landowners who participate in grazing leases and mineral leases. The economic analysis is unclear on the rule's effects on private landowners' abilities to continue these practices, and on the potential costs. For example, the western third of Dolores County, Colorado is primarily private land used for ranching, agriculture, and mineral extraction, much of which falls within proposed critical habitat, and comprising a large portion of the local economy. Numerous private entities have entered or may enter into leasing agreements with local ranchers for grazing rights or companies for mineral extraction, such as potash. The critical habitat designation will increase the costs of these agreements for landowners, small mining and excavation businesses, and local ranchers, preventing these small entities from readily entering into similar agreements in the future.

Advocacy also encourages FWS to examine the potential effects on recreation-based tourism, which is "significantly dependent" on the use of Federal lands.²⁵ FWS' analysis focuses solely on managerial costs to federal action agencies. FWS' analysis assumes users are able to use other trails and any other potential costs are inseparable from costs associated with current recreation conservation efforts.²⁶ A number of major recreational races, which bring significant revenue into the local economy, rely on trails within proposed critical habitat in Gunnison County. The influx of participants supports local bike shops, running stores, and other small businesses.²⁷ One, a mountain-bike race, supports a non-profit specifically aimed at trail advocacy and sage-grouse protection,²⁸ which benefits sage-grouse conservation and would be lost as a result of the critical habitat designation. These races would shut down, significantly impacting the local economy and other small businesses relying on recreational tourism.²⁹

FWS should also examine the potential effects on small municipalities, particularly regarding transportation projects and development of habitat conservation plans. FWS' economic analysis does not address the potential costs to small municipalities, which is required under the RFA.³⁰ Eleven out of twelve counties containing portions of the

²⁵ John Loomis, Economic Review of Economic Analysis of Critical Habitat Designation for the Gunnison Sage-Grouse: IEc Draft Report August 27, 2013 13 (2013) [*hereinafter* "Loomis Review"] *attached to* Letter from Gunnison County Board of County Commissioners, to Daniel Ashe, Director, U.S. Fish and Wildlife Service 61 (Oct. 18, 2013) (on file with author), <http://www.regulations.gov#!documentDetail;D=FWS-R6-ES-2012-0108-0575>).

²⁶ Economic Analysis, *supra* at ¶239. FWS' "baseline" approach "moves any economic impact that can be attributed to listing [or other events] below the baseline and . . . takes into account only those economic impacts rising above the baseline," also known as the "incremental" costs. New Mexico Cattle, at 1280. Thus, impacts attributable co-extensively to other causes are not considered. *Id.* at 1280, 1283.

²⁷ See Loomis Review, *supra* at 23.

²⁸ See Gunnison Trails – Mission, <http://gunnisontrails.com/our-mission/>. See also Sage Burner Trail Run Home Page, <http://sageburnertrailrun.com/>.

²⁹ *Id.* at 12-13.

³⁰ 5 U.S.C. § 601(5). "[T]he term 'small government jurisdiction' means governments of cities, counties, towns, . . . [or] school districts, . . . with a population of less than fifty thousand . . ." *Id.*

proposed critical habitat designation have populations of less than 50,000 residents, qualifying as “small government jurisdictions.”³¹ The economic analysis does not discuss any potential impacts to local governments while discussing transportation.³² FWS states transportation projects threaten sage-grouse habitat through degradation, fragmentation, or destruction,³³ and will require reclamation of disturbed areas.³⁴ Despite involving predominantly private properties and requiring additional monitoring and management across all public lands,³⁵ FWS omits any economic analysis of cost to small municipalities in regard to transportation. Concurrently, FWS concludes the “baseline” impacts to transportation projects will be \$6.1 million and the incremental impacts will be \$1.3 million “associated with additional monitoring and management, as well as programmatic and informal consultation.”³⁶ A number of county officials have voiced concerns regarding FWS’ transportation analysis, in particular the methodology behind the calculated costs.³⁷ Further, the economic analysis states local governments and other small entities may need to develop habitat conservation plans in order to pursue commercial and governmental objectives.³⁸ However, habitat conservation plans place significant burdens on small entities as the development of such plans can be increasingly expensive and the real burden is placed on small municipalities.³⁹

Conclusion

Advocacy remains committed to helping FWS comply with its RFA obligations and assisting the agency in reducing the regulatory impact on small entities. Critical habitat

³¹ The 2012 population projections for each county containing proposed critical habitat are: (1) in Colorado: Delta (30,432), Dolores (1,994), Fremont (46,788), Gunnison (15,475), Hinsdale (810), Mesa (147,848), Montrose (40,725), Ouray (4,530), Saguache (6,304), and San Miguel (7,580); and (2) in Utah: Grand (9,328) and San Juan (14,965). U.S. Census Bureau – State & County Quickfacts, <http://quickfacts.census.gov/qfd/states/08000.html>.

³² Economic Analysis, *supra* at ¶226-250.

³³ *Id.* at ¶227.

³⁴ *Id.* at ¶229 (stating “[R]ecreation and transportation activities can minimize these threats by incorporating the following conservation efforts, among others: seasonal closures in sage-grouse habitat; siting construction or infrastructure projects within existing development footprints; and reclamation of disturbed areas.”).

³⁵ *Id.* at ¶227, 240.

³⁶ *Id.* at ¶246.

³⁷ Loomis Review, *supra* at 65-67. Costs to applicants wishing to build roads are underestimated as: (1) not all management actions are included in the economic analysis; and (2) the analysis omits the costs associated with (i) the applicant demonstrating no reasonable and feasible alternative, (ii) offsite mitigation at ratio of greater than one acre reclaimed per acre disturbed, and (iii) loss of routes, concurrently impacting recreation and tourism. *Id.* at 66.

³⁸ Economic Analysis, *supra* at ¶52. FWS states, regarding additional management costs, “We are unable to separate the incremental portion of management effort[s], and therefore assign all costs to the baseline. This assumption may result in minor underestimation of incremental impacts.” *Id.* at ¶240. The baseline costs are \$6.1 million, versus \$1.3 million in incremental costs. *Id.* at ¶52.

³⁹ Letter from City of Gunnison, Colorado, to U.S. Fish and Wildlife Service 7 (Nov. 26, 2013) (on file with author) [*hereinafter* “Gunnison Comments”]. “Based on an assessment of Habitat Conservation Plans (HCP) implemented across the nation, the costs for development of such plans can range from \$344,653 (Polk County, FL) to \$6.3 million (Santa Clara County, CA). But, that is not the true expense of an HCP. The implementation of an HCP can range from \$131 million (Edward, TX Aquifer, a seven year HCP) to \$657 million (Santa Clara, CA 50 year HCP).” *Id.*

designations have direct effects on small entities which should be reflected in FWS' regulatory flexibility analysis. Advocacy recommends that FWS publish an IRFA. In the IRFA, Advocacy encourages FWS to examine the potential effects of the critical habitat designation on private landowners who participate in grazing leases and mineral leases, on recreation-based tourism, and on small municipalities, particularly regarding transportation projects and development of habitat conservation plans.

Please feel free to contact me, Assistant Chief Counsel Kia Dennis, or Regulatory Fellow Daniel T. Kane at (202) 205-6936 if you have any questions or require additional information.

Sincerely,

/s/

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/s/

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/s/

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